

AUG 17 1976

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-58

SAMUEL H. SLOAN, SAMUEL H. SLOAN & Co.,
Petitioners
v.

SECURITIES & EXCHANGE COMMISSION, UNITED STATES
OF AMERICA as the SECURITIES AND EXCHANGE COM-
MISSION, NATIONAL QUOTATION BUREAU, INC.,
BUNKER RAMO CORP., NATIONAL ASSOCIATION OF
SECURITIES DEALERS, INC., DISCLOSURE INC.,
NATIONAL CLEARING CORP., *Respondents*

On Writ of Certiorari to the United States Court of Appeals
for the Second Circuit

**BRIEF FOR RESPONDENTS IN OPPOSITION
NATIONAL ASSOCIATION OF SECURITIES
DEALERS, INC., BUNKER RAMO CORP.,
NATIONAL CLEARING CORP.**

FRANK J. WILSON
General Counsel
National Association of
Securities Dealers, Inc.

ROBERT J. WOLDOW
General Counsel

JEFFREY M. SILOW
Attorney
National Clearing Corp.

1735 K Street, N. W.
Washington, D. C. 20006

Counsel For Respondents
In Opposition National
Association of Securities
Dealers, Inc., Bunker Ramo
Corp., National Clearing Corp.

August, 1976

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	2
Statement of the Case	3
Argument	5
Conclusion	20
Appendices:	
A. The Maloney Act, 15 U.S.C. § 78o-3	1a
B. Exchange Act Rule 15Aj-2, 17 C.F.R. 240.15Aj-2	14a
C. Exchange Act Rule 15Aj-3, 17 C.F.R. 240.15Aj-3	16a

CITATIONS

CASES:

<i>Gordon v. New York Stock Exchange</i> , 422 U.S. 659 (1975)	6, 12, 17, 18, 19
<i>Harwell v. Growth Programs</i> , 451 F.2d 240 (5th Cir. 1971), <i>reh. den.</i> 459 F.2d 461, <i>cert. den.</i> 409 U.S. 876 (1972)	9, 10, 18
<i>In the Matter of National Association of Securities Dealers, Inc.</i> , 20 S.E.C. 508 (1945)	9
<i>In re National Association of Securities Dealers, Inc.</i> , 5 S.E.C. 627 (1939)	7
<i>International Association of Machinists v. Street</i> , 367 U.S. 740 (1961)	9

	Page
<i>National Association of Securities Dealers, Inc., Exchange Act Release No. 96-32 (June 7, 1972), aff'd sub nom. National Association of Securities Dealers, Inc. v. Securities and Exchange Commission, 486 F.2d 1314 (C.A.D.C. 1973)</i>	13
<i>Ricci v. Chicago Merchantile Exchange, 409 U.S. 289 (1973)</i>	17, 18
<i>R. H. Johnson & Co. v. Securities and Exchange Commission, 198 F.2d 690 (2d Cir. 1952)</i>	18
<i>Silver v. New York Stock Exchange, 302 F.2d 714 (2d Cir. 1962), rev'd 373 U.S. 341 (1963)</i>	9, 17, 18
<i>Thill Securities Corporation v. New York Stock Exchange, 433 F.2d 264 (7th Cir. 1970), cert. den. 401 U.S. 994 (1971)</i>	16, 18
<i>United States v. National Association of Securities Dealers, Inc., 422 U.S. 694 (1975)</i>	6, 12, 13, 17, 18, 19
<i>United States v. Morgan, 118 F. Supp. 621 (S.D.N.Y. 1953)</i>	9
<i>United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940)</i>	9
STATUTES:	
The Securities Exchange Act of 1934, 15 U.S.C. §§ 78a et seq.	Passim
The Securities Acts Amendments of 1975, Pub. L. 94-29, 15 U.S.C. §§ 78a et seq.	Passim
The Maloney Act, 15 U.S.C. § 78o-3	Passim
15 U.S.C. § 78a	3
15 U.S.C. § 78o-3(b)	4, 10, 14
15 U.S.C. § 78o-3(b)(8)	7, 12, 14
15 U.S.C. § 78o-3(b)(9)	13
15 U.S.C. § 78o-3(b)(10)	13
15 U.S.C. § 78o-3(b)(12)	7, 13-14

	Page
15 U.S.C. § 78o-3(d)	14
15 U.S.C. § 78o-3(e)	10
15 U.S.C. § 78o-3(g)	13
15 U.S.C. § 78o-3(h)	10, 13
15 U.S.C. § 78o-3(h)(2)	14
15 U.S.C. § 78o-3(i)	10
15 U.S.C. § 78o-3(i)(1)	8
15 U.S.C. § 78o-3(j)	11
15 U.S.C. § 78o-3(k)	11, 13
15 U.S.C. § 78o-3(n)	9, 10
15 U.S.C. § 78o-3(y)	13
15 U.S.C. § 78y(a)	15, 16
15 U.S.C. § 78o-3(b)(6) as amended by the Securities Acts Amendments of 1975	8
15 U.S.C. § 78o-3(b)(11) as amended by the Securities Acts Amendments of 1975	8
15 U.S.C. § 78o-3(e) as amended by the Securities Acts Amendments of 1975	8
28 U.S.C. § 1254(1)	2
52 Stat. 1070 (1938)	6
OTHER AUTHORITIES:	
S. Rep. No. 94-75, 94th Cong. 1st Sess. (1975)	8, 10, 11, 18
II L. Loss, <i>Securities Regulation</i> , Ch. 8C § 3 (2 Ed. 1961)	9
17 C.F.R. 240.15Aj-2	14, 15
17 C.F.R. 240.15Aj-3	15-16

IN THE
Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-58

SAMUEL H. SLOAN, SAMUEL H. SLOAN & Co.,
Petitioners
v.

SECURITIES & EXCHANGE COMMISSION, UNITED STATES
OF AMERICA as the SECURITIES AND EXCHANGE COM-
MISSION, NATIONAL QUOTATION BUREAU, INC.,
BUNKER RAMO CORP., NATIONAL ASSOCIATION OF
SECURITIES DEALERS, INC., DISCLOSURE INC.,
NATIONAL CLEARING CORP., *Respondents*

On Writ of Certiorari to the United States Court of Appeals
for the Second Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION
NATIONAL ASSOCIATION OF SECURITIES
DEALERS, INC., BUNKER RAMO CORP.,
NATIONAL CLEARING CORP.

OPINIONS BELOW

The decision of the United States District Court for the Southern District of New York is included as Appendix D of the Petition. The opinion of the United States Court of Appeals for the Second Circuit (App.

A of Petition) is reported at slip op. 2377 (No. 75-7283, 2d Cir. March 4, 1976). The order of the United States Court of Appeals for the Second Circuit amending the opinion of March 4, 1976 and denying the Petition for Rehearing is included as Appendix B of the Petition; the order of the United States Court of Appeals for the Second Circuit denying the Suggestion That The Rehearing Be In Banc is included as Appendix C of the Petition.

JURISDICTION

The judgment of the Court of Appeals was entered on March 4, 1976. The opinion of the Court of Appeals was amended and a Petition For Rehearing was denied on April 16, 1976; the Suggestion That The Rehearing Be In Banc was also denied on the same date. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether primary and exclusive jurisdiction over the subject matter of the Complaint lies with the Securities and Exchange Commission?
2. Whether the actions of respondents, National Association of Securities Dealers, Inc., Bunker Ramo Corp. and National Clearing Corp. are exempt from application of the antitrust laws?

STATUTE INVOLVED

The statutory provisions involved are contained in Section 15A of the Securities Exchange Act of 1934, 15 U.S.C. § 78o-3, commonly known as the "Maloney Act"

of 1938, as amended prior to June 4, 1975.¹ The Maloney Act is printed in Appendix A, *infra*, pp. 1a-13a.

STATEMENT OF THE CASE

On October 22, 1975, Petitioners, Samuel H. Sloan and Samuel H. Sloan & Co., ("Petitioner"), filed an Amended Complaint in the United States District Court for the Southern District of New York naming, among others, as additional defendants, the National Association of Securities Dealers, Inc. ("NASD"), Bunker Ramo Corporation ("Bunker Ramo") and National Clearing Corporation ("NCC"), collectively, "Respondents", to the action against the Securities and Exchange Commission (the "Commission").

The Amended Complaint alleged that certain actions taken by Respondents violated the antitrust laws, in addition to making numerous frivolous allegations including violations of the antifraud provisions of the Exchange Act and/or of the Common Law. Those alleged actions of Respondents, which were taken pursuant to the direct mandate of the pervasive regulatory scheme of the Securities Exchange Act of 1934 (the "Exchange Act"), and which were claimed by Petitioner to violate the antitrust laws, related to qualifications for initial and continued participation in the NASD's automated quotation system, NASDAQ, and membership in the NASD's securities clearance sub-

¹ On June 4, 1975, the Securities Acts Amendments of 1975 (the "1975 Amendments"), Pub. L. No. 94-29 as codified in 15 U.S.C. §§ 78a (Supp. 4, 1975), amended the Maloney Act. Since the supposed actions of which Petitioner complains allegedly occurred prior to June 4, 1975, all references are to the Securities Exchange Act of 1934 prior to said date unless otherwise stated.

sidiary, NCC. See Section 15A(b), 15 U.S.C. § 78o-3(b).

The jurisdiction of the District Court was incorrectly invoked by Petitioner since the proper forum for the deliberation of the subject matter of the Complaint, as held by the District Court, was primarily and exclusively with the Commission.

On February 14, 1975, after oral argument, the District Court granted the Securities and Exchange Commission's motion to dismiss as to all defendants.²

On February 27, 1975, judgment was entered by the Clerk of the District Court dismissing the Complaint as to all defendants without leave to replead (App. E of Petition).

On February 24, 1975, however, Petitioner filed a Notice of Motion for Reargument alleging that, among other things, the action of the District Court foreclosed the avenues for redress of his grievances.

On March 4, 1975, Respondents filed a Notice of Motion In Opposition to Plaintiff's Motion for Reargument with an accompanying Memorandum In Support.

² Respondents joined in motions to dismiss since it appeared that the central issue in the Complaint was directed at actions taken either jointly or separately by the Respondents in accordance with the regulatory responsibilities (pursuant to the Maloney Act) of the NASD, a registered national securities association. NCC, the wholly owned subsidiary of the NASD, provides securities clearance and settlement services to NASD members and other entities. Bunker Ramo was the owner and operator of the NASD's automated quotation system ("NASDAQ"), which was developed at the direction of and operated under the regulation and control of the NASD. On February 9, 1976 the NASD purchased NASDAQ system and contracted with Bunker Ramo to continue to operate said system.

On April 1, 1975 the District Court endorsed an Order denying the Motion for Reargument.

On March 28, 1975 Petitioner filed a Notice of Appeal to the United States Court of Appeals for the Second Circuit.

After submission of Briefs and upon oral argument held February 19, 1976, the Court of Appeals, on March 4, 1976, affirmed the judgment of the District Court.³ (App. A of Petitioner). On April 16, 1976, the Court of Appeals amended its opinion and denied a Petition For Rehearing (App. B of Petition); the Suggestion That The Rehearing Be In Banc was denied on the same date (App. C of Petition).

The Petition For A Writ of Certiorari To The United States Court Of Appeals For The Second Circuit was filed on July 15, 1976.

ARGUMENT

The Petitioner has argued that the NASD, Bunker Ramo and NCC have taken actions which are violative of the antitrust laws and the antifraud provisions of the Exchange Act and the common law. The courts below have correctly recognized that these actions were taken pursuant to the regulatory mandate and scheme of the Maloney Act (App. A of Petition, p. 5a; App. D of Petition, p. 16a). As such, the Court of Appeals held that none of the actions charged constituted antitrust violations (App. A of Petition, p. 5a). Additionally, as was evidenced in the courts below, pursu-

³ The Court of Appeals, noting Petitioners broadside attack upon the entire structure of securities regulation in the United States, agreed with the District Court that the "attack is frivolous". (App. A of Petition, p. 4a)

ant to the Congressionally prescribed regulatory scheme, the proper forum for the deliberation of the subject matter of the Complaint is primarily and exclusively the Securities and Exchange Commission.

Petitioner's allegations and history of similar litigious conduct leaves no doubt that, upon the facts of this case, the characterization as "frivolous" by the Court of Appeals of the challenged legality of the entire structure of securities regulation in the United States must be manifestly correct (App. A of Petition, p. 4a). The law is settled and there is no asserted conflict of legal decision nor in light of the legislative history of the Exchange Act, which includes the 1975 Amendments, could any other result have been reached. Thus, there is no important question of federal law requiring decision by this Court.

I.

The Decision Below Is Correct

NO VIOLATION OF THE ANTITRUST LAWS.

The Court of Appeals, citing generally two recent decisions of this Court,⁴ held that "... none of the actions charged constitute antitrust violations essentially because they were taken pursuant to the scheme of securities regulation established by the Securities Exchange Act of 1934."

The Exchange Act was amended in 1938 to add the Maloney Act. 52 Stat. 1070 (1938). The regulatory features of the Maloney Act were to be effectuated through self-regulation by over-the-counter brokers

⁴ *United States v. National Association of Securities Dealers, Inc.*, 422 U.S. 694 (1975) and *Gordon v. New York Stock Exchange*, 422 U.S. 659 (1975).

and dealers. The vehicle envisioned by Congress in order to so carry out industry self-regulation was a securities association registered with and under the supervision of the Securities and Exchange Commission. The NASD is the only national securities association which has been registered. *In re National Association of Securities Dealers, Inc.*, 5 S.E.C. 627 (1939).

To qualify for registration, a national securities association must satisfy the comprehensive requirements of, among other things, Section 15A(b)(8), 15 U.S.C. § 78o-3(b)(8). This section provided that the rules of a national securities association must be designed:

... to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to provide safeguards against unreasonable profits or unreasonable rates or commissions or other charges, and, in general, to protect investors and the public interest, and to remove impediments to and perfect the mechanism of a free and open market; and are not designed to permit unfair discrimination between customers, or issuers, or brokers or dealers, to fix minimum profits, to impose any schedule of prices or to impose any schedule of fixed minimum rates or commissions, allowances, discounts, or other charges.

Additionally, Section 15A(b)(12), 15 U.S.C. § 78o-3(b)(12), stated:

The rules of the association include provisions governing the form and content of quotations relating to securities sold otherwise than on a national securities exchange which may be distributed or published by any member or person associated with a member, and the persons to whom such quotations may be supplied. Such rules

relating to quotations shall be designed to produce fair and informative quotations, to prevent fictitious or misleading quotations, and to promote orderly procedures for collecting, distributing and publishing quotations . . .

In order to effectuate these requirements, Section 15A(i)(1), 15 U.S.C. § 78o-3(i)(1) provided that:

The rules of a registered securities association may provide that no member thereof shall deal with any non-member broker or dealer . . . except at the same prices, for the same commissions or fees, and on the same terms and conditions as are by such member accorded to the general public.

Congress has recently restated its intent in the 1975 Amendments⁵ as follows:

. . . a self-regulatory organization must be able to prevent an unqualified person from obtaining access to facilities and business opportunities by denying membership. And members transactions with non-members must be regulated, as the Supreme Court pointed out in the *Silver* case, in order that “. . . contact with an unreliable non-member [does not] injure the member or the member’s customer on whose behalf the contract is made and [thus] ultimately imperil the future status of [the self-regulatory organization] by sapping public confidence. S. Rep. No. 94-75 at 24.

⁵ This is especially important since the NASD’s undertaking to regulate its membership is not discretionary with respect to persons qualified for membership. If a person meets the requirements for membership contained in the Maloney Act, the persons must be admitted. S. Rep. No. 94-75, 94th Cong. 1st Sess. (1975) at 24.

It should be noted that the Maloney Act, as it has been amended by the 1975 Amendments, retains substantially the same requirements as it contained prior to June 4, 1975. See section 15A(b)(6), Section 15A(b)(11) and Section 15A(c).

Petitioner’s contention that the exclusionary policy of the NASD in permitting only NASD members to subscribe to Level III of NASDAQ violates the anti-trust laws must fail in light of the statutory mandate above. The Maloney Act requires that the NASD regulate the business conduct of its membership, including member/non-member relationships on NASDAQ.

Congress recognized that this statutory scheme for regulation could conflict with other federal statutes and provided in Section 15A(n) of the Maloney Act, 15 U.S.C. § 78o-3(n), that:

[i]f any provision of this section is in conflict with any provision of any law of the United States in force on the date this section takes effect, the provisions of this section shall prevail.

The courts, commentators and the Securities and Exchange Commission⁶ have stated that this section, under certain circumstances, acts to exempt Association rules when such have been required by the Exchange Act and reviewed by the Securities and Exchange Commission. While the section has recently been removed from the Maloney Act by the 1975 Amendments, Congress has stated in this regard:

[I]n light of the anomalous absence of a similar provision with respect to national securities ex-

⁶ *Harwell v. Growth Programs*, 451 F.2d 240 (5th Cir., 1971), *reh. den.* 459 F.2d 461 *cert. den.* 409 U.S. 876 (1972); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) [n. 60 in Justice Douglas’ opinion p. 227]; *International Association of Machinists v. Street*, 367 U.S. 740 (1961) [n. 16 in Justice Frankfurter’s dissenting opinion, p. 809]; *United States v. Morgan*, 118 F. Supp. 621, 693 (S.D.N.Y. 1953); *Silver v. New York Stock Exchange*, 302 F.2d 714 (2d Cir. 1962) *rev’d* 373 U.S. 341 [Judge Waterman’s dissenting opinion, p. 722]; *In the Matter of the National Association of Securities Dealers, Inc.*, 20 S.E.C. 508 (1945); See Also II L. Loss, *Securities Regulation*, Ch. 8C(2d Ed. 1961) at pp. 1369-1370.

changes and the prevailing case law interpreting the Section (e.g. *Harwell v. Growth Programs*) the Committee decided to delete the provision as superfluous and unnecessary.

The deletion of Section 15A(n) is not intended to change existing law with respect to the relationship between antitrust and securities laws nor is any other provision of S. 249 intended to change that relationship. S. Rep. No. 94-75 at 14.

In the face of this express exemption from the antitrust laws for actions taken by Respondents as required by the regulatory scheme of the Maloney Act, under the pervasive and potent oversight of the Commission, the Court of Appeals properly affirmed the decision of the District Court.

Even if a claim of express exemption were not available, the affirmation of the lower court's decision must stand as correct under the standards enunciated by this Court in finding implied repeal of the antitrust laws.

The Maloney Act, particularly the specific provisions contained within Section 15A(b),⁷ Section 15A(e),⁸ Section 15A(h),⁹ Section 15A(i)¹⁰

⁷ 15 U.S.C. § 78o-3(b) (See Appendix p. 1a, *infra*), relating to registration requirements for a national securities association under the Exchange Act.

⁸ 15 U.S.C. § 78o-3(e) (See Appendix p. 8a, *infra*), relating to the granting or denial of registration for a national securities association under the Exchange Act.

⁹ 15 U.S.C. § 78o-3(h) (See Appendix p. 9a, *infra*), relating to Commission review of disciplinary actions taken by the NASD.

¹⁰ 15 U.S.C. § 78o-3(i) (See Appendix p. 10a, *infra*), relating to membership restrictions of a national securities association.

and Sections 15A(j) and 15A(k),¹¹ directed that the NASD take certain actions and gave the Commission direct regulatory power and mandated positive action over NASD rules and practices with regard to the exclusionary actions alleged by the Petitioner. Under the statutory scheme, the Commission reviewed the rules of the NASD relating to the NASDAQ system, operated by Bunker Ramo, and its securities clearance system, operated by NCC, and "non-disapproved" them prior to their effectiveness.¹²

The pervasiveness of the regulatory scheme conferred by Congress upon the Commission relating to the practices of the NASD, its systems operator and clearing facility would effect an implied repeal of the antitrust laws. To deny antitrust immunity with respect to the narrow factual pattern presented by the Petitioner would be to subject the NASD and its members to conflicting standards. These conflicting standards would arise since the sole aim of antitrust legislation is to protect competition while the Commission's consideration includes, in addition to the protection of competition, the economic health of investors and the securities industry as well as the public in-

¹¹ 15 U.S.C. §§ 78o-3(j) and (k) (See Appendix p. 11a, *infra*), relating to the Commission's duty to alter, amend, supplement or abrogate the rules and practices of the NASD if necessary.

¹² The NASD and NCC have submitted their rules to the Commission for appropriate review and regulation under the Exchange Act since 1939 and 1971 respectively.

The duty of the Commission to act on rules proposals under the Maloney Act has been characterized by Congress as comprised of specific "affirmative and negative requirements." "Report of the Committee on Banking, Housing and Urban Affairs, United States Senate," S. Rep. No. 94-75, 94th Cong. 1st Sess. (1975).

terest. *Gordon v. New York Stock Exchange*, 422 U.S. 659 (1975).

Thus, if a conflict between the Exchange Act and the antitrust laws exists based upon the facts of this case, the antitrust laws must be displaced by the pervasive regulatory scheme to insure that the Exchange Act works and does not subject Respondents and their members to duplicative and inconsistent standards. *United States v. National Association of Securities Dealers, Inc.*, 422 U.S. 694 (1975).

Primary and Exclusive Jurisdiction Lies With the Securities and Exchange Commission

As indicated above, the Amended Complaint filed in the District Court naming the NASD, Bunker Ramo and NCC incorrectly invoked the jurisdiction of the District Court since the proper forum for deliberation of the subject matter of the Complaint is primarily and exclusively the Securities and Exchange Commission *supra* p. 4.

The District Court was manifestly correct in stating that Petitioner's method for challenge of the exclusionary rules and regulations of the Respondents was by resort to the Commission in the first instance and by further resort to the Court of Appeals. (App. D of Petition, p. 16a).

The Maloney Act, which was added to the Exchange Act in order "[t]o provide . . . a mechanism of regulation among over-the-counter brokers and dealers . . . [and] to prevent acts and practices inconsistent with just and equitable principles of trade . . ." 15 U.S.C. § 78o-3(b)(8), provided a procedure by which the regulations of a registered national securities association

could be challenged. The procedure was by way of a Petition to Abrogate filed by the Commission, with appeal to the United States Courts of Appeals. 15 U.S.C. § 78o-3(k); 15 U.S.C. § 78y.¹³ Comparable procedures were also provided by Congress in order to challenge disciplinary and other actions. 15 U.S.C. §§ 78o-3(b)(9), (10), (g) and (h); 15 U.S.C. § 78y.

The Commission, in accepting its responsibilities, has consistently taken the public position that an initial attack on an NASD rule is one ". . . over which the Commission is granted exclusive jurisdiction by Section 15A of the . . . Exchange Act . . .". *United States v. National Association of Securities Dealers, Inc.*, 422 U.S. 694, 731 n. 43 (1975).

The registration requirements of the Maloney Act direct that the rules of a national securities association must contain provisions governing the form and content of quotations sold otherwise than on a national exchange:

. . . which may be disseminated by any member or any person associated with a member, and the persons to whom such quotations may be supplied . . . Such rules relating to quotations shall be designed to produce fair and informative quotations, both at the wholesale and retail level, to prevent fictitious or misleading quotations, and to promote orderly procedures for collecting and publishing quotations . . . [T]he Commission may, after notice and opportunity for hearing, suspend the

¹³ The Commission has specifically invoked this authority to abrogate. See *National Association of Securities Dealers, Inc.*, Securities Exchange Act Release No. 96-32 (June 7, 1972) *aff'd*, *National Association of Securities Dealers, Inc. v. Securities and Exchange Commission*, 486 F.2d 1314 (C.A.D.C. 1973).

registration of any association if it finds the rules thereof do not conform to the requirements of this subsection . . . , and any such suspension shall remain in effect until the Commission issues an order determining that such rules have been modified to conform with such requirements. Section 15A(b)(12), 15 U.S.C. § 78o-3(b)(12).

Changes in or additions to the rules of a national securities association could not become effective until the Commission was afforded an opportunity for review of the proposals under a Congressionally mandated obligation to disapprove them unless they were found to be consistent with the requirements of Sections 15A(b) and (d), 15 U.S.C. §§ 78o-3(b) and (d).

The Maloney Act requirements have been specifically applied to the NASDAQ system, which was developed, owned and operated by Bunker Ramo under the direction of, and in accordance with the By-laws and rules of the NASD by Exchange Act Rule 15Aj-2, 17 C.F.R. 240.15Aj-2.¹⁴ This rule directs that the standards enunciated in Sections 15A(b)(8), (12) and (h)(2) relating to the rules of a national securities association which must be designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market, and not permit unfair discrimination between customers or issuers, or brokers or dealers; to produce fair and informative quotations, to prevent fictitious or misleading quotations, and to assure that any disciplinary action pursuant to the rules shall not be excessive or oppressive, having due regard to the public interest be applied to the NASDAQ system.

¹⁴ Exchange Act Rule 15Aj-2 is printed in Appendix B, *infra*, pp. 14a-15a.

In addition, Rule 15Aj-2 required that the Association's rules must also provide a "fair and orderly procedure" with respect to excluding or limiting the access of any customer, issuer or broker or dealer. The requirement was also included for adherence to due process in any procedure so adopted and review of the Association's action by the Commission upon its own motion or upon application of the person aggrieved.

The NASD has adopted, as Article XVI of its By-laws, provisions in accord with Rule 15Aj-2 directing that members *and other persons* aggrieved by the application of NASDAQ "qualifications, criteria, standards and charges . . ." by the NASD or by the operation of the NASDAQ system by Bunker Ramo are entitled to a hearing and decision thereon by the NASD Board of Governors and thereafter, appeal to the Commission in accordance with the Maloney Act. Pursuant to Section 25(a) of the Exchange Act, 15 U.S.C. § 78y(a), appeal to the United States Court of Appeals of the Commission's final order is available.

Similarly, the Maloney Act requirements have been extended pursuant to Exchange Act Rule 15Aj-3, 17 C.F.R. 240.15Aj-3,¹⁵ and specifically applied to the NASD's clearing subsidiary, NCC. This rule, identical in its mandate to Rule 15Aj-2 discussed above, imposed a duty upon the NASD with respect to access to its operation of systems and facilities for clearance and settlement of securities:

Such rules shall also provide a fair and orderly procedure with respect to the determination of

¹⁵ Exchange Act Rule 15Aj-3 is printed in Appendix C, *infra*, pp. 16a-17a.

whether any customer or issuer or broker or dealer may be excluded or limited in respect of requested access to such system . . .

Again, promptly upon the effectiveness of Rule 15Aj-3, the NASD adopted Article XVII of its By-laws thereby providing members *and other persons* aggrieved by the "rules, qualifications, criteria, standards and charges . . ." applied by NCC or by the operation of the NCC system shall, in any case for which binding and final arbitration has not been provided by NCC rules,¹⁶ be entitled to a hearing and decision thereon by the NASD Board of Governors and thereafter, appeal to the Commission in accordance with the Maloney Act. Pursuant to Section 25(a) of the Exchange Act, 15 U.S.C. § 78y(a), appeal to the United States Courts of Appeals of the Commission's final order is available.

The Courts have set forth factors which may be considered in resolving the question of primary Commission jurisdiction in antitrust challenges to actions taken under the apparent authority of the Exchange Act. The effects of such actions on competition, the degree of actual review by the Commission and the extent to which the action is necessary to make the Exchange Act work may be considered. *Thill Securities Corp. v. New York Stock Exchange*, 433 F.2d 264 (7th Cir. 1970), *cert. den.* 401 U.S. 994 (1971). Additional determinants may be found if an aggrieved party may initiate Commission review of the action under a provision of the Exchange Act and if Commission expertise

¹⁶ The limitation as to grievances which must be submitted to arbitration would not be applicable to the exclusionary actions alleged herein.

is useful in resolving in the first instance whether the action is necessary to make the Exchange Act work. *Ricci v. Chicago Merchantile Exchange*, 409 U.S. 289 (1973).

Two recent cases in this Court, *Gordon v. New York Stock Exchange*, 422 U.S. 659 (1975) and *United States v. National Association of Securities Dealers, Inc.*, 422 U.S. 694 (1975), wherein the actions of the Exchange and the NASD, respectively, were found to be immune from antitrust challenges, indicate that a primary determination should be made not by the courts but by the Commission under its duty to oversee and insure the protection of competition under the Exchange Act as well as the protection of the investing public.

Thus, against the requirements of the Exchange Act, the actions of the NASD, Bunker Ramo and NCC must clearly be challenged primarily and exclusively with the Commission.

II.

There Is No Conflict of Decision

Petitioner asserts that the decision in the instant case is contrary to the decisions of the courts or of the administrative agency charged with responsibility for the regulatory scheme.

To buttress the assertion, cases are cited by Petitioner which do not differ with this case as to the law, but only as to principle. It is clear that the law regarding repeal of the antitrust laws in order to make the Exchange Act work is not in conflict with the decision at bar.

In *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963) this Court noted, in upholding an anti-

trust challenge to an exchange rule that a different result might have been reached if exchange self-regulation were subject to the jurisdiction of the Commission and ultimately judicial review as is NASD self-regulation. 373 U.S. at 358 n. 12.

Congress recently extended the Commission's jurisdiction over the NASD to the exchanges and others under the 1975 Amendments and stated:

The Committee believes that the statutory pattern governing the scope of the NASD's authority is basically sound. This bill [S. 249] would extend the pattern now applicable to registered associations to exchanges. S. Rep. 94-75 at 27.

Applying the doctrines enunciated in *Silver* with the recognition of the Congressional intent in the passage of amendments to the Exchange Act, three United States Courts of Appeals and the United States District Court for the District of Columbia have had little difficulty in recognizing the importance of the Exchange Act prevailing over the antitrust laws when the provisions of the two are in conflict so that the statutory scheme for regulating the securities market may work.¹⁷

¹⁷ *Gordon v. New York Stock Exchange*, 422 U.S. 659 (1975); *R. H. Johnson & Co. v. Securities and Exchange Commission*, 198 F.2d 690 (2nd Cir. 1952) cert. den. 344 U.S. 855 (1952); *Harwell v. Growth Programs*, 451 F.2d 240 (5th Cir. 1971) reh. den. 459 F.2d 461 cert. den. 409 U.S. 876 (1972); *Thill Securities Corp. v. New York Stock Exchange*, 433 F.2d 264 (7th Cir. 1970) cert. den. 401 U.S. 944 (1971); See also *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289 (1973); *United States v. National Association of Securities Dealers, Inc.*, 422 U.S. 694 (1975).

The Commission has fully accepted its responsibilities in this area and has voiced its agreement with the decisions relating thereto, *supra*, p. 13.

The Court below in the instant case held:

[T]he other . . . branch of Sloan's complaint . . . charges the various non-governmental defendants with violations of the Sherman and Clayton Acts. But none of the actions charged constitute anti-trust violations, essentially because they were taken pursuant to the scheme of securities regulation established by the Securities Exchange Act of 1934. (App. A of Petition, p. 5a)

There is no conflict of decision in this case. *Gordon v. New York Stock Exchange*, 422 U.S. 659 (1975); *United States v. National Association of Securities Dealers, Inc.*, 422 U.S. 694 (1975).

III.

There Is No Important Question of Federal Law

Petitioner insists, however, that the challenge mounted here as to the legality of the entire structure of securities regulation in the United States is an important question of federal law which this Court should settle. This assertion flies in the face of the characterizations by the District Court and Court of Appeals that such an attack is frivolous. (App. A of Petition, p. 4a; App. D of Petition).

It is well settled that government regulation of the securities industry is an accepted exercise of authority by the Congress in order to protect the economic health of the markets and the public. The Commission and the self-regulatory organizations directly derive their responsibilities pursuant to Congressional mandate. Petitioner must be charged with the knowledge that

he chose to operate in a closely regulated field in which the public interest and public policy play a dominant part.

The mere framing of a question on a grand scale, the setting out of irrational allegations in pseudo-legalistic form¹⁸ or the listing of variances in principle among the holdings of the courts does not make an important federal question.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari be denied.

Respectfully submitted,

FRANK J. WILSON
General Counsel
National Association of
Securities Dealers, Inc.

ROBERT J. WOLDOW
General Counsel
JEFFREY M. SILOW
Attorney
National Clearing Corp.

1735 K Street, N. W.
Washington, D. C. 20006

Counsel For Respondents
In Opposition National
Association of Securities
Dealers, Inc., Bunker Ramo
Corp., National Clearing Corp.

August, 1976

¹⁸ Petitioner requests the Court to grant the writ based upon, among others, the reason that Respondents had violated the federal antifraud provisions of the securities laws challenged as unconstitutional. There has been no showing, however, of the prima facie elements of fraud nor of any alleged injury to the Petitioner. The District Court correctly characterized this attack as a "particularly irrational claim" (App. D of Petition, p. 17a).

APPENDIX

APPENDIX A**SECTION 15A OF THE SECURITIES EXCHANGE ACT OF 1934**

SECTION 15 A. (a) Any association of brokers or dealers may be registered with the Commission as a national securities association pursuant to subsection (b), or as an affiliated securities association pursuant to subsection (d), under the terms and conditions hereinafter provided in this section, by filing with the Commission a registration statement in such form as the Commission may prescribe, setting forth the information, and accompanied by the documents, below specified:

(1) Such data as to its organization, membership, and rules of procedure, and such other information as the Commission may by rules and regulations require as necessary or appropriate in the public interest or for the protection of investors; and

(2) Copies of its constitution, charter, or articles of incorporation or association, with all amendments thereto, and of its existing bylaws, and of any rules or instruments corresponding to the foregoing, whatever the name, hereinafter in this title collectively referred to as the "rules of the association."

Such registration shall not be construed as a waiver by such association or any member thereof of any constitutional right or of any right to contest the validity of any rule or regulation of the Commission under this title.

(b) An applicant association shall not be registered as a national securities association unless it appears to the Commission that—

(1) by reason of the number of its members, the scope of their transactions, and the geographical distribution of its members such association will be able to comply with the provisions of this title and the rules and regulations thereunder and to carry out the purposes of this section.

(2) such association is so organized and is of such a character as to be able to comply with the provisions of this title and the rules and regulations thereunder, and to carry out the purposes of this section.

(3) the rules of the association provide that any broker or dealer who makes use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security otherwise than on a national securities exchange, may become a member of such association, except such as are excluded pursuant to paragraph (4) or (5) of this subsection, or a rule of the association permitted under this paragraph. The rules of the association may restrict membership in such association on such specified geographical basis, or on such specified basis relating to the type of business done by its members, or on such other specified and appropriate basis, as appears to the Commission to be necessary or appropriate in the public interest or for the protection of investors and to carry out the purpose of this section. Rules adopted by the association may provide that the association may, unless the Commission directs otherwise in cases in which the Commission finds it appropriate in the public interest so to direct, deny admission to or refuse to continue in such association any broker or dealer if—

(A) such broker or dealer, whether prior or subsequent to becoming such, or

(B) any person associated with such broker or dealer, whether prior or subsequent to becoming so associated,

has been and is suspended or expelled from a national securities exchange or has been and is barred or suspended from being associated with all members of such exchange, for violation of any rule of such exchange.

(4) the rules of the association provide that, except with the approval or at the direction of the Commission in cases in which the Commission finds it appro-

priate in the public interest so to approve or direct, no broker or dealer shall be admitted to or continued in membership in such association, if such broker or dealer—

(A) has been and is suspended or expelled from a registered securities association (whether national or affiliated) or from a national securities exchange or has been and is barred or suspended from being associated with all members of such association or from being associated with all brokers or dealers which are members of such exchange, for violation of any rule of such association or exchange which prohibits any act or transaction constituting conduct inconsistent with just and equitable principles of trade, or requires any act the omission of which constitutes conduct inconsistent with just and equitable principles of trade.

(B) is subject to an order of the Commission denying, suspending for a period not exceeding twelve months, or revoking his registration pursuant to section 15 of this title, or expelling or suspending him from membership in a registered securities association or a national securities exchange, or barring or suspending him from being associated with a broker or dealer.

(C) whether prior or subsequent to becoming a broker or dealer, by his conduct while associated with a broker or dealer, was a cause of any suspension, expulsion, or order of the character described in clause (A) or (B) which is in effect with respect to such broker or dealer, and in entering such a suspension, expulsion, or order, the Commission or any such exchange or association shall have jurisdiction to determine whether or not any person was a cause thereof.

(D) has associated with him any person who is known, or in the exercise of reasonable care should be known, to him to be a person who, if such person were a broker or dealer, would be ineligible for admission to or continuance in membership under clause (A), (B), or (C) of this paragraph.

(5) the rules of the association provide that, except with the approval or at the direction of the Commission in cases in which the Commission finds it appropriate in the public interest so to approve or direct, no person shall become a member and no natural person shall become a person associated with a member, unless such person is qualified to become a member or a person associated with a member in conformity with specified and appropriate standards with respect to the training, experience, and such other qualifications of such person as the association finds necessary or desirable, and in the case of a member, the financial responsibility of such member. For the purpose of defining such standards and the application thereof, such rules may—

(A) appropriately classify prospective members (taking into account relevant matters, including type of business done and nature of securities sold) and persons proposed to be associated with members.

(B) specify that all or any portion of such standards shall be applicable to any such class.

(C) require persons in any such class to pass examinations prescribed in accordance with such rules.

(D) provide that persons in any such class other than prospective members and partners, officers and supervisory employees (which latter term may be defined by such rules and as so defined shall include branch managers of members) of members, may be qualified solely on the basis of compliance with specified standards of training and such other qualifications as the association finds appropriate.

(E) provide that applications to become a member or a person associated with a member shall set forth such facts as the association may prescribe as to the training, experience, and other qualifications (including, in the case of an applicant for membership, financial responsibility) of the applicant and that the association may adopt procedures for verification of qualifications of the applicant.

(F) require any class of persons associated with a member to be registered with the association in accordance with procedures specified by such rules (and any application or document supplemental thereto required by such rules of a person seeking to be registered with such association shall, for the purposes of subsection (a) of section 32 of this title, be deemed an application required to be filed under this title).

(6) the rules of the association assure a fair representation of its members in the adoption of any rule of the association or amendment thereto, the selection of its officers and directors, and in all other phases of the administration of its affairs.

(7) the rules of the association provide for the equitable allocation of dues among its members, to defray reasonable expenses of administration.

(8) the rules of the association are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to provide safeguards against unreasonable profits or unreasonable rates of commissions or other charges, and in general, to protect investors and the public interest, and to remove impediments to and perfect the mechanism of a free and open market; and are not designed to permit unfair discrimination between customers or issuers, or brokers or dealers, to fix minimum profits, to impose any schedule of prices, or to impose any schedule or fix minimum rates of commissions, allowances, discounts, or other charges.

(9) the rules of the association provide that its members and persons associated with its members shall be appropriately disciplined, by expulsion, suspension, fine, censure, or being suspended or barred from being associated with all members, or any other fitting penalty, for any violation of its rules.

(10) the rules of the association provide a fair and orderly procedure with respect to the disciplining of members and persons associated with members and the denial of membership to any broker or dealer seeking membership therein or the barring of any person

from being associated with a member. In any proceeding to determine whether any member or other person shall be disciplined, such rules shall require that specific charges be brought; that such member or person shall be notified of, and be given an opportunity to defend against, such charges; that a record shall be kept; and that the determination shall include—

(A) a statement setting forth any act or practice in which such member or other person may be found to have engaged, or which such member or other person may be found to have omitted.

(B) a statement setting forth the specific rule or rules of the association of which any such act or practice, or omission to act, is deemed to be in violation.

(C) a statement whether the acts or practices prohibited by such rule or rules, or the omission of any act required thereby, are deemed to constitute conduct inconsistent with just and equitable principles of trade.

(D) a statement setting forth the penalty imposed.

In any proceeding to determine whether a broker or dealer shall be denied membership or whether any person shall be barred from being associated with a member, such rules shall provide that the broker or dealer or person shall be notified of, and be given an opportunity to be heard upon, the specific grounds for denial or bar which are under consideration; that a record shall be kept; and that the determination shall set forth the specific grounds upon which the denial or bar is based.

(11) the requirements of subsection (c), insofar as these may be applicable, are satisfied.

(12) the rules of the association include provisions governing the form and content of quotations relating to securities sold otherwise than on a national securities exchange which may be disseminated by any member or any person associated with a member, and

the persons to whom such quotations may be supplied. Such rules relating to quotations shall be designed to produce fair and informative quotations, both at the wholesale and retail level, to prevent fictitious or misleading quotations, and to promote orderly procedures for collecting and publishing quotations.

The provisions of this subsection, as in effect prior to the date of enactment of the Securities Acts Amendments of 1964, shall be applicable to the rules of any registered securities association which was registered on such date until July 1, 1964. After July 1, 1964, the Commission may, after notice and opportunity for hearing, suspend the registration of any such association if it finds that the rules thereof do not conform to the requirements of this subsection, as amended by section 7 of the Securities Acts Amendments of 1964, and any such suspension shall remain in effect until the Commission issues an order determining that such rules have been modified to conform with such requirements.

(c) The Commission may permit or require the rules of an association applying for registration pursuant to subsection (b), to provide for the admission of an association registered as an affiliated securities association, pursuant to subsection (d) to participation in said applicant association as an affiliate thereof, under terms permitting such power and responsibilities to such affiliates, and under such other appropriate terms and conditions, as may be provided by the rules of said applicant association, if such rules appear to the Commission to be necessary or appropriate in the public interest or for the protection of investors and to carry out the purposes of this section. The duties and powers of the Commission with respect to any national securities association or any affiliated securities association shall in no way be limited by reason of any such affiliation.

(d) An applicant association shall not be registered as an affiliated securities association unless it appears to the Commission that—

(1) such association, notwithstanding that it does not satisfy the requirements set forth in paragraph (1) of subsection (b), will, forthwith upon the registration thereof, be admitted to affiliation with an association registered as a national securities association pursuant to said subsection (b), in the manner and under the terms and conditions provided by the rules of said national securities association in accordance with subsection (c); and

(2) such association and its rules satisfy the requirements set forth in paragraphs (2) to (10), inclusive, and paragraph (12), of subsection (b); except that in the case of any such association any restrictions upon membership therein of the type authorized by paragraph (3) of subsection (b) shall not be less stringent than in the case of the national securities association with which such association is to be affiliated.

(e) Upon the filing of an application for registration pursuant to subsection (b) or subsection (d), the Commission shall by order grant such registration if the requirements of this section are satisfied. If, after appropriate notice and opportunity for hearing, it appears to the Commission that any requirement of this section is not satisfied, the Commission shall by order deny such registration. If any association granted registration as an affiliated securities association pursuant to subsection (d) shall fail to be admitted promptly thereafter to affiliation with a registered national securities association, the Commission shall revoke the registration of such affiliated securities association.

(f) A registered securities association (whether national or affiliated) may, upon such reasonable notice as the Commission may deem necessary in the public interest or for the protection of investors, withdraw from regis-

tration by filing with the Commission a written notice of withdrawal in such form as the Commission may by rules and regulations prescribe. Upon the withdrawal of a national securities association from registration, the registration of any association affiliated therewith shall automatically terminate.

(g) If any registered securities association (whether national or affiliated) takes any disciplinary action against any member thereof or any person associated with such a member or denies admission to any broker or dealer seeking membership therein, or bars any person from being associated with a member, such action shall be subject to review by the Commission, on its own motion, or upon application by any person aggrieved thereby filed within thirty days after such action has been taken or within such longer period as the Commission may determine. Application to the Commission for review, or the institution of review by the Commission on its own motion, shall operate as a stay of such action until an order is issued upon such review pursuant to subsection (h), unless the Commission otherwise orders after notice and opportunity for hearing on the question of a stay (which hearing may consist solely of affidavits and oral arguments).

(h)(1) In a proceeding to review disciplinary action taken by a registered securities association against a member thereof or a person associated with a member, if the Commission, after appropriate notice and opportunity for hearing, upon consideration of the record before the association and such other evidence as it may deem relevant—

(A) finds that such member or person has engaged in such acts or practices, or has omitted such act, as the association has found him to have engaged in or omitted, and

(B) determines that such acts or practices, or omission to act, are in violation of such rules of the association as have been designated in the determination of the association,

the Commission shall by order dismiss the proceeding, unless it appears to the Commission that such action should be modified in accordance with paragraph (2) of this subsection. The Commission shall likewise determine whether the acts or practices prohibited, or the omission of any act required, by any such rule constitute conduct inconsistent with just and equitable principles of trade, and shall so declare. If it appears to the Commission that the evidence does not warrant the finding required in clause (A), or if the Commission determines that such acts or practices as are found to have been engaged in are not prohibited by the designated rule or rules of the association, or that such act as is found to have been omitted is not required by such designated rule or rules, the Commission shall by order set aside the action of the association.

(2) If, after appropriate notice and opportunity for hearing, the Commission finds that any penalty imposed upon a member or person associated with a member is excessive or oppressive, having due regard to the public interest, the Commission shall by order cancel, reduce, or require the remission of such penalty.

(3) In any proceeding to review the denial of membership in a registered securities association or the barring of any person from being associated with a member, if the Commission, after appropriate notice and hearing, and upon consideration of the record before the association and such other evidence as it may deem relevant, determines that the specific grounds on which such denial or bar is based exist in fact and are valid under this section, the Commission shall by order dismiss the proceeding; otherwise, the Commission shall by order set aside the action of the association and require it to admit the applicant broker or dealer to membership therein, or to permit such person to be associated with a member.

(i) (1) The rules of a registered securities association may provide that no member thereof shall deal with any nonmember broker or dealer (as defined in paragraph (2) of this subsection) except at

the same prices, for the same commissions or fees, and on the same terms and conditions as are by such member accorded to the general public.

(2) For the purposes of this subsection, the term "non-member broker or dealer" shall include any broker or dealer who makes use of the mails or of any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security otherwise than on a national securities exchange, who is not a member of any registered securities association, except a broker or dealer who deals exclusively in commercial paper, bankers' acceptances, or commercial bills.

(3) Nothing in this subsection shall be so construed or applied as to prevent any member of a registered securities association from granting to any other member of any registered securities association any dealer's discount, allowance, commission, or special terms.

(j) Every registered securities association shall file with the Commission in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, copies of any changes in or additions to the rules of the association, and such other information and documents as the Commission may require to keep current or to supplement the registration statement and documents filed pursuant to subsection (a). Any change in or addition to the rules of a registered securities association shall take effect upon the thirtieth day after the filing of a copy thereof with the Commission, or upon such earlier date as the Commission may determine, unless the Commission shall enter an order disapproving such change or addition; and the Commission shall enter such an order unless such change or addition appears to the Commission to be consistent with the requirements of subsection (b) and subsection (d).

(k) (1) The Commission is authorized by order to abrogate any rule of a registered securities asso-

ciation, if after appropriate notice and opportunity for hearing, it appears to the Commission that such abrogation is necessary or appropriate to assure fair dealing by the members of such association, to assure a fair representation of its members in the administration of its affairs or otherwise to protect investors or effectuate the purposes of this title.

(2) The Commission may in writing request any registered securities association to adopt any specified alteration of or supplement to its rules with respect to any of the matters hereinafter enumerated. If such association fails to adopt such alteration or supplement within a reasonable time, the Commission is authorized by order to alter or supplement the rules of such association in the manner theretofore requested, or with such modifications of such alteration or supplement as it deems necessary if, after appropriate notice and opportunity for hearing, it appears to the Commission that such alteration or supplement is necessary or appropriate in the public interest or for the protection of investors or to effectuate the purposes of this section, with respect to—

(A) the basis for, and procedure in connection with, the denial of membership or the barring from being associated with a member or the disciplining of members or persons associated with members, or the qualifications required for members or natural persons associated with members or any class thereof.

(B) the method for adoption of any change in or addition to the rules of the association.

(C) the method of choosing officers and directors.

(D) affiliation between registered securities associations.

(1) The Commission is authorized, if such action appears to it to be necessary or appropriate in the public interest or for the protection of investors or to carry out the purposes of this section—

(1) after appropriate notice and opportunity for hearing, by order to suspend for a period not exceed-

ing twelve months or to revoke the registration of a registered securities association, if the Commission finds that such association has violated any provision of this title or any rule or regulation thereunder, or has failed to enforce compliance with its own rules, or has engaged in any other activity tending to defeat the purposes of this section.

(2) after appropriate notice and opportunity for hearing, by order to suspend for a period not exceeding twelve months or to expel from a registered securities association any member thereof, or to suspend for a period not exceeding twelve months or to bar any person from being associated with a member thereof, if the Commission finds that such member or person—

(A) has violated any provision of this title or any rule or regulation thereunder, or has effected any transaction for any other person who, he had reason to believe, was violating with respect to such transaction any provision of this title or any rule or regulation thereunder.

(B) has willfully violated any provision of the Securities Act of 1933, as amended, or of any rule or regulation thereunder, or has effected any transaction for any other person who, he had reason to believe, was willfully violating with respect to such transaction any provision of such Act or rule or regulation.

(3) after appropriate notice and opportunity for hearing, by order to remove from office any officer or director of a registered securities association who, the Commission finds, has willfully failed to enforce the rules of the association, or has willfully abused his authority.

(m) Nothing in this section shall be construed to apply with respect to any transaction by a broker or dealer in any exempted security.

(n) If any provision of this section is in conflict with any provision of any law of the United States in force on the date this section takes effect, the provision of this section shall prevail.

APPENDIX B

§ 240.15Aj-2 RULES OF A NATIONAL SECURITIES ASSOCIATION
RELATING TO A SYSTEM OF SECURITIES QUOTATIONS.

(a) Any national securities association which adopts, or proposes to adopt, any rules providing for or regulating a system for the quotation of bid or offering or other prices of securities shall incorporate in such rules a provision to the effect that insofar as such rules prescribe the conditions of access to such system, such rules shall be applied and interpreted in accordance with the standards of subparagraphs 8 and 12 of paragraph (b) and paragraph (h)(2) of section 15A of the Act, including the requirement that rules of such an association shall be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market, and not to permit unfair discrimination between customers or issuers, or brokers or dealers; to produce fair and informative quotations, both at the wholesale and retail level, to prevent fictitious or misleading quotations, and to promote orderly procedures for collecting and publishing quotations; and to assure that any disciplinary action pursuant to such rules shall not be excessive or oppressive, having due regard to the public interest.

(b) Such rules shall also provide a fair and orderly procedure with respect to the determination of whether any customer or issuer or broker or dealer may be excluded or limited in respect of requested access to such system including provisions:

(1) For notice of and opportunity to be heard upon the specific grounds for exclusion or limitation which are under consideration;

(2) That a record shall be kept; and

(3) That the determination shall set forth the specific grounds upon which the exclusion or limitation is based.

(c) In the event of any such exclusion or limitation, such action shall be subject to review by the Commission, on its own motion or upon application by any person aggrieved thereby filed within 30 days after such action has been taken or within such longer period as the Commission may determine. In any proceeding for such review, if the Commission, after appropriate notice and opportunity for hearing, and upon consideration of the record before the association and such other evidence as it may deem relevant, determines that the specific grounds on which such action is based exist in fact and are in accord with the applicable rules of the association (including the provisions thereof required to be included by paragraph (a) of this section), the Commission shall by order dismiss the proceeding. Otherwise, the Commission shall by order set aside the action of the association and require the association to accord the aggrieved person access to such system or to take such other action as may be appropriate, subject to such terms and conditions as the Commission determines to be in accordance with the public interest and consistent with the rules of such association.

(15 U.S.C. 78o, 78o-3) [33 F.R. 19167, Dec. 24, 1968]

APPENDIX C

§ 240.15Aj-3 RULES FOR A NATIONAL SECURITIES ASSOCIATION RELATING TO A FACILITY FOR CLEARING AND/OR SETTLING SECURITIES TRANSACTIONS.

(a) Any national securities association which directly or indirectly adopts, or proposes to adopt, any rules providing for or regulating a system for the clearance and/or settlement of securities transactions shall incorporate in such rules a provision to the effect that insofar as such rules prescribe the conditions of access to such system, such rules shall be applied and interpreted in accordance with the standards of paragraph (b)(8) of section 15A of the Act, including the requirement that rules of such an association shall be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market, and not to permit unfair discrimination between customers or issuers, or brokers or dealers; and to assure that any disciplinary action pursuant to such rules shall not be excessive or oppressive, having due regard to the public interest.

(b) Such rules shall also provide a fair and orderly procedure with respect to the determination of whether any customer or issuer or broker or dealer may be excluded or limited in respect of requested access to such system including provisions:

(1) For notice of an opportunity to be heard upon the specific grounds for exclusion or limitation which are under consideration;

(2) That a record shall be kept; and

(3) That the determination shall set forth the specific grounds upon which the exclusion or limitation is based.

(c) In the event of any such exclusion or limitation, such action shall be subject to review by the Commission, on its own motion, or upon application by any person ag-

grieved thereby filed within 30 days after such action has been taken or within such longer period as the Commission may determine. In any proceeding for such review, if the Commission, after appropriate notice and opportunity for hearing, and upon consideration of the record before the association and such other evidence as it may deem relevant, determines that the specific grounds on which such action is based exist in fact and are in accord with the applicable rules of the association (including the provisions thereof required to be included by paragraph (a) of this section), the Commission shall by order dismiss the proceeding. Otherwise, the Commission shall by order set aside the action of the association and require the association to accord the aggrieved person access to such system or to take such other action as may be appropriate, subject to such terms and conditions as the Commission determines to be in accordance with the public interest and consistent with the rules of such association.

(Sec. 15A(j), 52 Stat. 1070, 15 U.S.C. 78o-3(j); sec. 23(a))
[37 F.R. 6851, Apr. 5, 1972]